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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 776

OCTOBER TERM, 1961.

LAWRENCE J. LONG,
Petitioner,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,
a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Appellate Court of Illinois.

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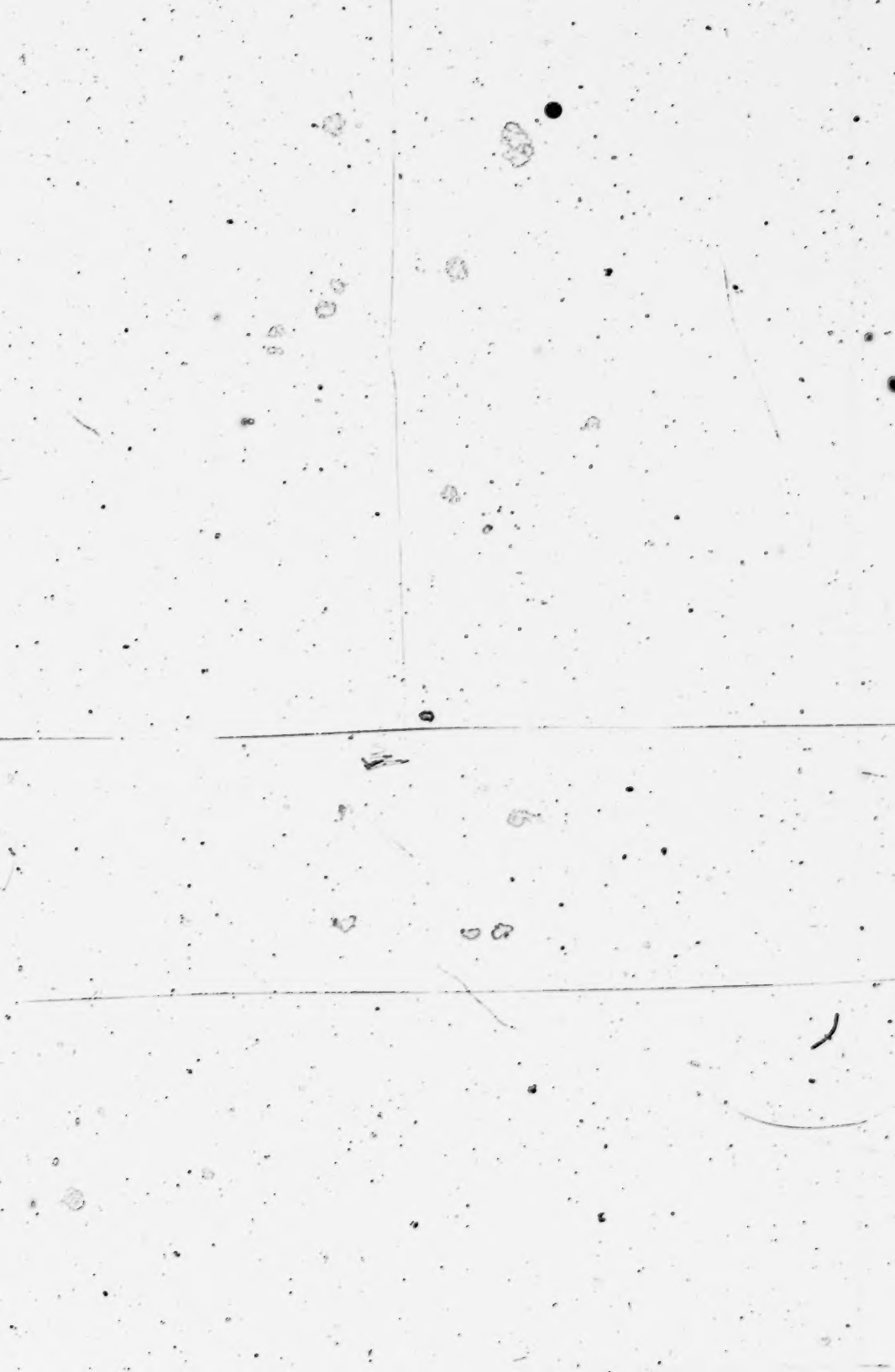

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, Third District, reported in 32 Ill. App. 2d 103; 176 N. E. 2d 812.

BASIS OF JURISDICTION

The Appellate Court judgment was entered September 6, 1961. Leave to appeal to the Illinois Supreme Court was sought, but denied January 22, 1962. Both the Appellate Court opinion and Supreme Court judgment appear in the Appendix.

Jurisdiction is invoked under Title 28, *United States Code*, §1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Can a railroad employer, without complying with the requirements of 45 U. S. C. A. § 152, 156 change the medical examination requirements so as to substitute a wholly new type of color-vision test and disqualify an employee from continued employment on the basis of the new test?

2. When the railroad employer insists that the employee would have been disqualified under the old tests, is not a jury question presented as to credibility of its only medical witness where it is not disputed that the condition in question is congenital and unchanging from birth, that the employee passed satisfactorily ten former tests of that type, and his work showed a perfect record and not one missed signal in thirty years? Otherwise stated, was it not error to enter summary judgment for the defendant on the basis of that doctor's affidavit when countered by affidavits disclosing the results of other examinations and perfect work performance?

3. If such employee was disqualified under an illegal medical test, he is not required to take a field test as a condition precedent to continued employment. But, even if he were so required, may the railroad require a "field test" in which a 100% passing grade is required, in which the only persons present are its own officials and employees, and which tests it uniformly waived as to all employees other than the plaintiff? Is not, in other words, an arbitrary test so spottily applied a deprivation of property without due process of law?

4. Where the disqualification is, for all practical purposes, a discharge, does not the employee, under the *Moore* case have a right to sue in a state court instead of proceeding before the Railroad Adjustment Board? Indeed, would not the seeking of the latter remedy bar him from a suit at common law for wrongful discharge?

CONSTITUTIONAL AND STATUTORY QUESTIONS

In addition to the Fourteenth Amendment, the pertinent statute involved is the *Railway Labor Act*, with particular reference to 45 U. S. C. § 152 (7th), 156. These are set forth in the Appendix to save space.

STATEMENT OF THE CASE

Plaintiff sued defendant railroad in the Circuit Court of Champaign County, Illinois, for damages for wrongful discharge and demanded a jury trial. He alleged that he had worked for defendant for more than twenty-five years as fireman and engineer, that he had a slight congenital defect in color perception which had never interfered with the performance of his duties, that he passed every medical examination given to him under Circular No. 18 prescribing use of the "Holmgren Worsteds" (an identification of colored yarns test). He alleged that defendant in April, 1954, arbitrarily substituted a different type of test, disqualified him from service on the basis thereof, and insisted that he take an arbitrary and unfair "field test" which it did not require of other employees disqualified for color defects. He alleged that the action of defendant was motivated by malice because of a ruling made by plaintiff as an I. C. C. employee on a leave of absence, and refused to take the field test.

Defendant filed a motion for summary judgment, to which it attached affidavits including discovery depositions taken from plaintiff and defendant's officers. The plaintiff filed objections supported by affidavits, including admissions contained in these same depositions.

Dr. Murray, whose affidavit was used to support plaintiff's disqualification, stated in it that in his 1954 examination of plaintiff the latter had flunked both the Ishihara

(color dot) test and the Holmgren Worsteds test. However, it is not disputed that color defects are congenital in nature, which neither improve nor get worse as one proceeds through life (Abst. 68). Dr. Murray further testified in his deposition that the company records showed that the plaintiff had passed satisfactorily ten successive Holmgren Worsteds tests over the thirty-one year period from 1922 to 1953 with never a failure (Abst. 71-76).

Mr. Hallmann, personnel superintendent of the railroad, testified in his deposition that he had personally and on his own authority changed the tests in 1954 (Abst. 84), even though the Holmgren Worsteds tests were the only type ever used in the past (Abst. 46, 76) and even though Operating Circular 18 remained unchanged. Hallmann admitted writing a letter in 1956 that he was certain Long could perform the work (Abst. 67). He testified that Long had a perfect record, with no demerits, with no complaints ever made of any missed signal (Abst. 60-62), and that Long had received a commendation in 1953 for the acuity of his vision in spotting a broken rail, which averted a possible serious accident (Abst. 62). Hallmann further testified that there were other firemen, engineers, brakemen, and switchmen who had been disqualified by medical examinations for color defects or partial blindness who were put back to work without taking a field test (Abst. 92). Such was waived in their cases irrespective of prior demerits (Long had none), one having as many as 270 demerits (Abst. 62-64, 92-100, 102-108).

Wayne Johnston, Jr., in his deposition, confirmed the fact that plaintiff had a perfect work record, that he had received the commendation in 1953, that the requirement of a field test had been waived as to other employees performing like work with similar medical disqualifications, and that defendant had refused to waive in the instance of plaintiff (Abst. 62, 96-100).

The defendant's officials admitted that the field test requirement imposed upon plaintiff the requirement of 100% accuracy, that the grade was determined by two of the railroad officials, that plaintiff could not have an independent expert nor his own counsel present but simply another employee who would have no voice in grading (Abst. 80-82).

Plaintiff in his affidavit (Abst. 56-59) testified that his color perception was the same as when he first started to work for the defendant, that he had no difficulty in recognizing the primary colors; that while with the Interstate Commerce Commission, on a leave of absence, he had cited defendant railroad for a violation and had been told by its representatives that they would see that he encountered trouble; that two officials of defendant railroad had discussed means of getting rid of plaintiff, and that his discharge was actuated by malice.

Before securing counsel, plaintiff, on advice of the defendant railroad, applied for and received a pension from the Retirement Board for disability, which, he stated, would be repaid from this recovery (Abst. 58, 59).

FEDERAL QUESTIONS PRESENTED.

The complaint in the trial court set up a wrongful discharge. The defense relied upon the Railway Labor Act in an effort to defeat the judicial remedy (Abst. 119). Plaintiff's objections to defense motion for summary judgment set up the deprivation of property without due process of law (Abst. 56), and the Notice of Appeal preserved this ground under the Fourteenth Amendment (Abst. 136). The trial court, upon February 23, 1960, entered summary judgment for the defense, without opinion. The Illinois Supreme Court, to which a direct appeal was taken April 18, 1960, because of the constitutional questions involved, on October